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Heightened Pleading: Is There Life after Leatherman?

Karen M. Blum

HEIGHTENED PLEADING: IS THERE LIFE AFTER *LEATHERMAN*?

*Karen M. Blum**

I. INTRODUCTION

Despite the language of Federal Rule of Civil Procedure 8(a)(2)[1] and the United States Supreme Court's interpretation of that rule as merely requiring notice pleading,[2] the majority of lower federal courts have imposed a more stringent pleading requirement upon plaintiffs in section 1983[3] cases in an attempt to weed out frivolous claims at the pleadings stage. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[4] the Supreme Court unanimously rejected the "heightened

* Professor of Law, Suffolk University Law School. The author wishes to express her gratitude to former Dean Paul Sugarman and Suffolk University Law School for providing the financial and moral support necessary to do the research and writing of this Article.

1. Rule 8(a)(2) provides that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

2. Conley v. Gibson, 355 U.S. 41, 47 (1957). The Court in *Conley* held that the rule simply requires the plaintiff to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.*

3. 42 U.S.C. § 1983 (1988). Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

Id.

4. 113 S. Ct. 1160 (1993). On remand, the United States Court of Appeals for the Fifth Circuit affirmed the district court's adoption of its earlier alternative grant of summary judgment. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 28 F.3d 1388, 1390 (5th Cir. 1994). For an excellent discussion of *Leatherman* and a critical analysis of the heightened pleading standard, see Eric H. Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 72 N.C. L. REV. 1085 (1994).

pleading standard"[5] applied by the majority of lower federal courts[6] in cases alleging municipal liability under section 1983.[7]

In addition to cases alleging municipal liability, federal courts have applied the heightened pleading standard to section 1983 cases asserting individual capacity claims in which qualified immunity is a potential defense;[8] cases asserting individual capacity claims in which state of mind

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5. *See generally* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990) (providing extensive examination of the history and development of the heightened pleading standard, along with a thorough analysis and criticism of the rationale underlying the doctrine). This Article concurs with the conclusion reached by Professor Blaze that "the heightened pleading requirement simply is unnecessary." *Id.* at 990; *see also* C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 693 (1984) (criticizing the application by courts of a heightened pleading standard in civil rights cases to weed out frivolous claims).

6. *See, e.g.*, Sivard v. Pulaski County, 959 F.2d 662, 667 (7th Cir. 1992) ("This Court demands that plaintiffs suing a municipal body under § 1983 plead with greater specificity than might ordinarily be required."); Palmer v. City of San Antonio, 810 F.2d 514, 516-17 (5th Cir. 1987). The *Palmer* court explained that it has:

> consistently required a section 1983 plaintiff to state specific facts and not merely conclusory allegations. While it might be possible that a basis for municipal liability exists in this case, Palmer states no facts in his complaint to support his assertion that San Antonio authorized and approved the practice of its police officers using excessive force when making arrests or that such a well settled practice of doing so existed. . . . As we have made clear, the assertion of a single incident is not sufficient to show that a policy or custom exists on the part of a municipality.

Id. (citation omitted).

7. *Leatherman*, 113 S. Ct. at 1163. Preceding the Supreme Court's decision, the Fifth Circuit had upheld dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1058 (5th Cir. 1992), *rev'd*, 113 S. Ct. 1160 (1993). The case arose out of two separate incidents involving execution of search warrants by local law enforcement officers. The Fifth Circuit concluded that "[w]hile plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." *Id.*

Judge Goldberg wrote both the majority opinion and an opinion concurring specially. In his special concurrence, Judge Goldberg noted the numerous articles and essays by influential commentators who argue that a heightened pleading requirement is incompatible with the Federal Rules of Civil Procedure. *Id.* at 1059 (Goldberg, J., concurring specially) (listing articles criticizing heightened pleading requirement). While impressed by the "wealth of authority" supporting plaintiffs' position, Judge Goldberg concluded that Fifth Circuit precedent constrained the panel. *Id.* at 1061.

In 1985, the Fifth Circuit initially adopted the heightened pleading standard in individual capacity suits, where the defense of qualified immunity was likely to be raised. *See* Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985). Similarly, in *Palmer*, the Fifth Circuit applied the heightened pleading standard in a case brought against a municipality. *Palmer*, 810 F.2d at 516-17. Thus, as Judge Goldberg observed in *Leatherman*, under both *Elliott* and *Palmer* the heightened pleading requirement applies to all section 1983 complaints brought in the Fifth Circuit. *Leatherman*, 954 F.2d at 1058.

8. *See, e.g.*, Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993). The *Oladeinde* court noted:

is an essential component of the underlying constitutional claim;[9] and cases asserting a conspiracy.[10] While *Leatherman* unequivocally disposes of the heightened standard in municipal liability cases, the verdict is out on *Leatherman*'s impact upon the imposition of a heightened standard in other contexts. One commentator has observed that "[t]he varied reactions of lower courts to the *Leatherman* decision suggest that the Court

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> [W]e want to use this opportunity to repeat that, "in an effort to eliminate non-meritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases." In pleading a section 1983 action, some factual detail is necessary, especially if we are to be able to see that the allegedly violated right was clearly established when the allegedly wrongful acts occurred. We also stress that this heightened Rule 8 requirement . . . must be applied by the district courts . . . .

Id. at 1485 (citation omitted); Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 620 (5th Cir. 1992) (indicating that the Fifth Circuit "requires that § 1983 plaintiffs meet heightened pleading requirements in cases . . . in which an immunity defense can be raised" by " 'plead[ing] specific facts that, if proved, would overcome the individual defendant's immunity defense' " (quoting Geter v. Fortenberry, 849 F.2d 1550, 1553 (5th Cir. 1988))); Sawyer v. County of Creek, 908 F.2d 663, 665-66 (10th Cir. 1990) (noting that "prior to filing an affirmative defense, a defendant can challenge a complaint by filing either a motion to dismiss or a motion for summary judgment if the plaintiff has failed to come forward with facts or allegations that establish that the defendant has violated clearly established law"). *But see* Hunter v. District of Columbia, 943 F.2d 69, 75-77 (D.C. Cir. 1991) (explaining that "the heightened pleading requirement is not contingent upon the existence of a substantively distinct qualified immunity 'defense,' " rather "[w]hen a plaintiff claims that an officer used excessive force, the heightened pleading standard demands that he make 'nonconclusory allegations of evidence' sufficient to demonstrate that the force used actually was unreasonable").

In Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992), Judge Easterbrook noted the potential conflict between a " 'heightened pleading requirement' " and the relatively minimal requirements set out by Federal Rules of Civil Procedure 8 and 9(b). *Id.* at 345. He resolved the apparent inconsistency by speaking in terms of the minimum amount of proof required to defeat the initial motion for summary judgment and devaluing the heightened pleading requirement. *Id.* A plaintiff need not anticipate an immunity defense in her pleadings, Judge Easterbrook explained. *Id.* But once the defense is raised in the answer and the defendant moves for summary judgment on qualified immunity grounds, then plaintiff must produce " 'specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal.' " *Id.* at 344-45 (alteration in original) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

9. *See, e.g.*, Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991) (adopting heightened pleading standard with allegations of motivation supportable by direct or circumstantial evidence in cases in which a plaintiff accused an officer of deliberately or recklessly misleading a magistrate to obtain search warrants); Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988) (explaining that "[w]here . . . subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated").

10. *See, e.g.*, Crabtree v. Muchmore, 904 F.2d 1475, 1481 (10th Cir. 1990).

needs to clarify what circumstances, if any, would justify a heightened standard."[11]

This Article examines lower federal court case law after *Leatherman*. First, the Article exposes the divergent views courts have adopted as to *Leatherman's* reach—underscoring the need for Supreme Court clarification. Second, the Article questions the tenacity with which some courts adhere to the heightened pleading standard in the wake of *Leatherman*—refusing to extend the rationale of the decision beyond its facts.

After a brief discussion of *Leatherman* and its effect on municipal liability cases, this Article addresses the validity of heightened pleading in individual capacity suits. An examination of pre-*Leatherman* case law, as well as the Supreme Court's avoidance and reservation of the issue in *Siegert v. Gilley*[12] and *Leatherman*, will set the groundwork for a review of current case law. This Article primarily focuses on post-*Leatherman* decisions of the courts of appeals that address the issue of heightened pleading. Specifically, it addresses the tension created between a plaintiff who must allege impermissible motive to state a justiciable claim and a defendant who is entitled to an early disposition of his qualified immunity defense based on the objective reasonableness of his conduct.[13] These cases expose a range of options confronting lower courts after *Leatherman* and the need for guidance from the Supreme Court.

This Article concludes by challenging the assumption that the Supreme Court's decision in *Harlow v. Fitzgerald*[14] mandates that a plaintiff, alleging constitutional claims requiring proof of a defendant's subjective intent, is required to satisfy more rigorous pleading standards than required under the Federal Rules. In light of common sense, consistency, and fairness, this Article recommends that the courts adopt the approach taken by the United States Court of Appeals for the Seventh Circuit, shifting

11. Cottrell, *supra* note 4, at 1100 (footnote omitted).

12. 500 U.S. 226 (1991). In *Siegert*, the United States Court of Appeals for the District of Columbia Circuit dismissed plaintiff's complaint for failure to satisfy a heightened pleading requirement that calls for the pleading of direct evidence of motive in cases in which state of mind is an essential element of the plaintiff's underlying constitutional claim. Siegert v. Gilley, 895 F.2d 797, 800-01, 803-04 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991).

13. *See, e.g.*, Tompkins v. Vickers, 26 F.3d 603, 607-08 (5th Cir. 1994); Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457, 461 (9th Cir. 1994); Branch v. Tunnell, 14 F.3d 449, 452-53 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994); Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 496-97 (7th Cir. 1993); Kimberlin v. Quinlan, 6 F.3d 789, 793-94 & n.9 (D.C. Cir. 1993), *cert. granted*, 115 S. Ct. 929 (1995).

14. 457 U.S. 800 (1982).

the emphasis from a special pleading burden to the burden that a plaintiff has under a normal summary judgment procedure.[15]

II. *LEATHERMAN* AND MUNICIPAL LIABILITY CASES

In rejecting the heightened pleading standard in *Leatherman*, the Supreme Court rebuffed two distinct arguments put forth by the defendants in support of applying heightened pleading in suits against municipalities. First, the defendants equated a municipality's freedom from *respondeat superior* liability under section 1983[16] to an individual official's qualified or absolute immunity from suit.[17] Assuming the soundness of a heightened pleading standard in individual capacity suits, an

15. *See Triad*, 10 F.3d at 497; *infra* notes 95-105 and accompanying text; *see also* Elliott v. Thomas, 937 F.2d 338, 344 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992).

16. In Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), the Supreme Court overruled Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978), to the extent *Monroe* held that municipalities were totally immune from suit under section 1983. *Monell*, 436 U.S. at 961. *Monell* held that a local government could be sued under section 1983 when official policy or custom caused a constitutional injury, but could not be held liable merely because it employed a tortfeasor. *Id. See generally* Karen M. Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409 (1978).

17. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1162 (1993). A government official may invoke one of two types of immunity from personal liability for damages: absolute or qualified immunity. Forrester v. White, 484 U.S. 219, 224 (1988). The Supreme Court has adopted a " 'functional' " approach to immunity, so that whether an official is entitled to absolute or qualified immunity will depend on the function performed by that official in a particular context. *Id.* The Supreme Court has afforded officials performing judicial, legislative, or prosecutorial functions absolute immunity. *See, e.g.*, Mireles v. Waco, 502 U.S. 9, 12-13 (1991) (per curiam) (granting absolute judicial immunity when conduct is in excess of jurisdiction rather than in absence of jurisdiction); Burns v. Reed, 500 U.S. 478, 492, 496 (1991) (providing a prosecutor absolute immunity for functions performed in probable cause hearing, but only qualified immunity attached to function of giving legal advice to police); *Forrester* 484 U.S. at 228-29 (noting that a judge has absolute immunity only when acting in judicial, as opposed to administrative, capacity); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979) (finding absolute immunity for members of a regional land planning agency acting in legislative capacity); Stump v. Sparkman, 435 U.S. 349, 364 (1978) (finding absolute immunity for judge acting within jurisdiction); Imbler v. Pachtman, 424 U.S. 409, 424-26 (1976) (providing absolute immunity for prosecutors performing prosecutorial acts); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (finding absolute immunity for members of Congress); *see also* Watts v. Burkhart, 978 F.2d 269, 274 (6th Cir. 1992) (en banc) (affording absolute immunity to members of state medical licensing board sued in their individual capacities with respect to suspension or revocation of doctor's license).

In Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993), the Supreme Court held that prosecutors do not have absolute immunity with respect to claims that they had fabricated evidence during the preliminary investigation of a crime and had made false statements at a press conference announcing the arrest and indictment of petitioner. *Id.* at 2615; *see also* Antoine v. Byers & Anderson, Inc., 113 S. Ct. 2167, 2172 (1993) (holding that a court

assumption the Court had "no occasion to consider,"[18] defendants contended that a lesser pleading requirement would result in a waste of time, money, and resources of municipalities.[19]

The Court summarily and emphatically dismissed this argument by attacking the erroneous notion that municipalities had some sort of immunity from suit under section 1983. The Court's previous decisions clarify

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reporter is not entitled to absolute immunity from damages for failing to produce transcript of federal criminal trial).

Most government officials are entitled only to qualified immunity. In *Harlow v. Fitzgerald*, the Supreme Court adopted an objective test for qualified immunity. *Harlow*, 457 U.S. at 818. Under *Harlow*, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* In Anderson v. Creighton, 483 U.S. 635 (1987), the Court elaborated that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Because qualified immunity provides not only immunity from liability, but immunity from suit, Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), the Court has stressed that the immunity issue ordinarily should be decided long before trial. Hunter v. Bryant, 502 U.S. 224, 228 (1991). For an analysis of the doctrine of qualified immunity elsewhere, see generally Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993).

The Supreme Court recently held that private persons, named as defendants in section 1983 suits challenging their use of state replevin, garnishment, or attachment statutes later held unconstitutional, cannot invoke the qualified immunity available to government officials in such suits. Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992). On remand, the United States Court of Appeals for the Fifth Circuit held that "private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." Wyatt v. Cole, 994 F.2d 1113, 1120 (5th Cir.), *cert. denied*, 114 S. Ct. 470 (1993).

Commenting on the Fifth Circuit decision, the Third Circuit has indicated that although "*Wyatt* overrules the district court's holding that the [defendants] are entitled to qualified immunity, it leaves open the question whether private parties acting under color of state law can raise an affirmative defense of good faith in a section 1983 action." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1276-77 (3d Cir. 1994) (footnotes omitted). The Third Circuit explained that it agreed with the Fifth Circuit in *Wyatt*, but that malice under these circumstances "means a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process." *Id.* The Third Circuit concluded that " 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." *Id.*

Distinguishing the case before it from *Wyatt*, the Seventh Circuit allowed a private hospital to "raise a qualified immunity defense for administering anti-psychotic medication" to the plaintiff because it refused "to give private hospitals the Hobson's choice of obeying a court's order directing discretionary medical treatment, and facing liability for the resulting medical judgment, or refusing to make a medical judgment, and exposing hospital staff and patients to the risk of harm posed by a potentially violent mental patient." Sherman v. Four County Counseling Ctr., 987 F.2d 397, 406 (7th Cir. 1993).

18. *Leatherman*, 113 S. Ct. at 1162.

19. *Id.*

that municipalities cannot avail themselves of any type of immunity from suit.[20] Thus, defendants could not avail themselves of an immunity from suit rationale to justify a heightened pleading requirement in claims against local governments.

Defendants' second contention was that, in the context of suits against municipalities under section 1983, the nature of the substantive claim required that plaintiffs plead more than an instance of misconduct to state a claim under ordinary notice pleading requirements.[21] In essence, defendants argued that there really was no heightened pleading requirement imposed upon plaintiffs by the lower court.[22] An assertion of municipal liability for failure to train police adequately must demonstrate a pattern of similar constitutional violations by police officers to satisfy the requisite deliberate indifference to such conduct on the part of the municipal defendant.[23] Thus, the specificity in the complaint is dependant on the nature of the underlying substantive claim being asserted by plaintiffs.[24]

The defendants' argument was not persuasive to the Supreme Court. After examining Fifth Circuit case law, the Court concluded that "the 'heightened pleading standard' is just what it purports to be: a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief."[25] Finding it difficult to equate the heightened pleading requirement with the liberal notice pleading system of the Federal Rules, the Supreme Court suggested that Rules 8(a)(2)[26] and 9(b)[27] would have to be rewritten to incorporate such a heightened

20. *Id.* The Court noted that *Monell*, 436 U.S. at 701, expressly reserved the question of whether local governments were entitled to some form of limited immunity in suits brought under section 1983, and that the Court rejected any type of immunity for municipalities in such suits in Owen v. City of Independence, 445 U.S. 622, 650 (1980). *Leatherman*, 113 S. Ct. at 1162.

21. *Leatherman*, 113 S. Ct. at 1162.

22. *Id.*

23. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 388 (1989) ("[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."); Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985) ("[C]onsiderably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." (footnote omitted)).

24. *Leatherman*, 113 S. Ct. at 1162.

25. *Id.* at 1162-63. The Court noted that the Fifth Circuit had adopted the heightened pleading standard in Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985), a case involving individual liability, and then, in Palmer v. City of San Antonio, 810 F.2d 514 (5th Cir. 1987), extended the rule to section 1983 cases against municipalities. *Leatherman*, 113 S. Ct. at 1163.

26. *See supra* note 1.

27. Federal Rule of Civil Procedure 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

pleading standard.[28] The Court suggested that without such an amendment, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[29]

In reversing the Fifth Circuit, the Court noted the conflict among the courts of appeals on the issue of heightened pleading in municipal liability cases[30] and cited approvingly the Ninth Circuit's opinion in *Karim-Panahi v. Los Angeles Police Department*.[31] In *Karim-Panahi*, the Ninth Circuit required no more than an allegation that an individual officer's behavior "conformed to official policy, custom, or practice."[32] Post-*Leatherman* lower court decisions uniformly have abandoned the heightened pleading standard that applied in municipal liability cases, requiring only bare allegations or the minimum mandated by Rule 8(a)(2), to put the defendant on notice of the claim.[33]

Malice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

28. *Leatherman*, 113 S. Ct. at 1163.

29. *Id.*

30. *Id.* at 1162-63.

31. 839 F.2d 621 (9th Cir. 1988).

32. *Id.* at 624.

33. *See, e.g.*, Wayfield v. Town of Tisbury, No. 93-1535, 1993 U.S. App. LEXIS 30997, at *1 (1st Cir. Nov. 29, 1993) (reversing the district court for relying "in part on the doctrine that civil rights complaints must be pled with heightened particularity" and finding that "[t]he proper standard for assessing the adequacy of the instant complaint then is whether, accepting the factual allegations in the complaint as true, and construing these facts in the light most favorable to the plaintiff, the pleading shows any facts which could entitle plaintiff to relief"), *cert. denied*, 114 S. Ct. 2764 (1994); Kohl v. Casson, 5 F.3d 1141, 1148 (8th Cir. 1993) (noting that *Leatherman* rejected a requirement that plaintiff allege "particular instances of similar constitutional violations in order to defeat a motion to dismiss for failure to state a claim" and finding "the district court's rationale for dismissing the complaint" unsustainable); Watson v. Dowling, No. 93 CIV. 5839 (PKL), 1994 WL 319295, at *3 (S.D.N.Y. June 29, 1994) (finding that the "plaintiffs have met their burden by alleging the existence of a state policy of inadequate training and supervision" even though a single incident gave rise to the lawsuit); McGrath v. MacDonald, 853 F. Supp. 1, 5-6 (D. Mass. 1994) (finding that the "plaintiff's complaint satisfies the standard enunciated under *Leatherman*" because it "provides the City with fair notice of plaintiff's claims and sufficiently sets forth facts to outline the City's liability as a municipality"); Goldsmith v. City of Chicago, No. 93 C 1626, 1993 WL 532445, at *4 n.1 (N.D. Ill. Dec. 21, 1993) (explaining that [i]t used to be clear that a single allegation of misconduct could not generally state a claim for municipal policy liability" but that *Leatherman* rejects this rule); Johnson v. Lancaster County Children & Youth Social Serv. Agency, No. Civ.A.92-7135, 1993 WL 245280, at *9 (E.D. Pa. July 2, 1993) (explaining that "*Leatherman* cast doubt upon the Third Circuit's heightened pleading standard for section 1983 claims"); Simpkins v. Bellevue Hosp., 832 F. Supp. 69, 73 (S.D.N.Y. 1993) (holding a plaintiff is no longer required to state precisely in his complaint the policy by which he alleges the defendants violated his rights); Hall v. Lopez, 823 F. Supp. 857, 866 (D. Colo. 1993) (holding that the plaintiff's bare allegation that the City's policy or custom of encouraging no-knock searches was the moving force behind the violation of her constitutional rights was probably sufficient to

In *Jordan by Jordan v. Jackson*,[34] the United States Court of Appeals for the Fourth Circuit addressed the application of *Leatherman* in a case involving governmental liability.[35] The Fourth Circuit made some interesting observations concerning the scope of *Leatherman* in this context. The facts alleged in *Jordan by Jordan* strike fear in the hearts of working parents.[36] The Jordans were employed fulltime.[37] Babysitters cared for the youngest two of their three children when not in school.[38] The Jordans allowed Christopher, their ten-year-old son, to come home from school and take care of himself for about an hour and a half until Mr. and Mrs. Jordan returned home from work.[39] Christopher was taught to take care of himself and was required to call one or both parents upon arriving home.[40]

Someone reported to the Prince William County Department of Social Services (DSS) that Christopher was often home alone and was involved

withstand a motion to dismiss after *Leatherman*); Ciccotosto v. Holem, No. 92-C20065, 1993 WL 87722, at *3 (N.D. Ill. Mar. 26, 1993) (concluding that "the Supreme Court was quite clear in mandating that a plaintiff need only set forth a short and plain statement regarding municipal liability for purposes of a motion to dismiss"); Hammond v. Town of Cicero, 822 F. Supp. 512, 515 (N.D. Ill. 1993) (explaining that "[u]nder *Leatherman*, district courts may no longer impose heightened pleading requirements on plaintiffs asserting *Monell* claims" and must allow plaintiffs to advance a *Monell* claim if such claim "satisfies both the traditional *Conley* pleading requirements and Fed.R.Civ.P. 8(a)(2)").

34. 15 F.3d 333 (4th Cir. 1994).

35. *Id.* at 337-40. The Fourth Circuit indicated it confronted "a question of first impression in this circuit, and it is a question apparently not addressed in any other circuit either since . . . *Leatherman*." *Id.* at 337. The Court made no direct reference to Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993). In *Kohl*, the district court had dismissed a complaint against city and county defendants in their official capacities, on the ground that plaintiff "had failed to allege a pattern of similar incidents of unlawful arrest or that the city and county had notice of prior acts of police and prosecutorial misconduct." *Id.* at 1148. The court of appeals noted that the Supreme Court in *Leatherman* "held that requiring a plaintiff to allege particular instances of similar constitutional violations in order to defeat a motion to dismiss" was inconsistent with the notice pleading standard of the Federal Rules. *Id.* Thus, the Eighth Circuit concluded that the district court's rationale for dismissing the complaint against the government defendants was probably not sustainable. *Id.* The court had no need to pursue the matter, however, because it went on to uphold the dismissal on other grounds. *Id.*

36. *Jordan by Jordan*, 15 F.3d at 336. The Fourth Circuit opinion began as follows:

> We address in this appeal the awesome and, regrettably, sometimes necessary, power of the state to take custody of children from their parents in order to protect the children from irreparable injury or death. We confront herein allegations against the state in connection with its exercise of that power that, if true, are disturbing, and that we hope are exceptional.

Id.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

in fights with other children.[41] DSS assigned the matter to a social worker who confronted Christopher on a Friday afternoon as he walked home from the bus stop.[42] The social worker made no attempt to contact the Jordans or seek any supplemental information regarding the family.[43] Christopher, reacting as most children are instructed when approached by a stranger, ran away and tried to hide.[44] The social worker seized Christopher pursuant to a Virginia statute[45] that permits the taking into custody of a child for up to seventy-two hours without prior approval of the parents when the child's life or health is determined to be in imminent danger.[46] She left a handwritten note on the Jordans' door, informing them that Christopher had been taken into custody and would be in foster care for at least three days.[47]

The Jordans, upon arriving home and finding the note, feared that Christopher was kidnapped.[48] They immediately contacted the police who confirmed that Christopher was in foster care and that the Jordans could have no contact with him until Monday.[49] On Monday, Christopher was reunited with his parents.[50]

The Jordans brought a section 1983 action against Prince William County and the County DSS, challenging the initial summary removal of Christopher by the DSS as a violation of due process.[51] The plaintiffs alleged that their constitutional injury resulted from the defendants' maintenance of "various municipal policies or customs that proximately caused Christopher's allegedly unlawful removal."[52] The district court, viewing the allegations as simply asserting a claim under *respondeat supe-*

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. VA. CODE ANN. § 63.1-248.9 (Michie Supp. 1993).
46. *Jordan by Jordan*, 15 F.3d at 336.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* Plaintiffs maintained that the summary removal of Christopher "violated the guarantees of due process by unjustifiably interfering with the integrity and privacy of their family." *Id.* As such, this claim appears to allege a violation of substantive due process. The Jordans originally included as defendants the Commissioner of the Virginia DSS and the Manager of the Virginia Child Protective Services Program, but, on appeal, abandoned claims against these officials. *Id.* The individual social worker who removed Christopher was not named as a defendant. *Id.* at 340 n.6. The complaint also challenged the constitutionality of the state statute (Va. Code § 63.1-248.9(A)(6)) that permits delayed judicial review (up to seventy-two hours) of the emergency removal of a child from his home. *Id.* at 341. The court concluded that the statute was constitutional both facially and as applied. *Id.* at 341-56.
52. *Id.* at 337.

rior, dismissed for failure to state a claim.[53] On appeal, the defendants, arguing in support of the district court's dismissal, contended that the Jordans' failure to allege multiple incidents of misconduct in their complaint made the complaint fatally deficient and subject to dismissal under Rule 12(b)(6).[54]

The Fourth Circuit disagreed. Recognizing that substantive law places stringent requirements upon plaintiffs asserting municipal liability under section 1983, the Fourth Circuit noted the Supreme Court's rejection in *Leatherman* of the argument that pleading requirements in such cases ought to parallel what must be ultimately proved on the merits.[55] The court read *Leatherman* as repudiating requirements that facts be set out in detail or that multiple incidents be included in pleadings asserting municipal liability under section 1983.[56]

Perhaps of more significance than the Fourth Circuit's holding as to the breadth of *Leatherman* concerning suits involving local governments, is the Fourth Circuit's dicta as to what *Leatherman* does not mean for district court judges who fear that *Leatherman* may have opened the litigation floodgates. The Supreme Court counseled that, in the absence of a heightened pleading standard mandated by the Federal Rules, discovery and summary judgment procedures must be used to weed out frivolous suits.[57] The court of appeals expands upon this counsel and makes clear that *Leatherman* is not to be viewed as a license for plaintiffs to engage in unbridled discovery of municipalities to "cobble together support for what were conclusory allegations of an impermissible municipal policy."[58]

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53. *Id.*

54. *Id.*

55. *Id.* at 338. The Fourth Circuit observed that there was some uncertainty "as to the precise 'heightened standard' rejected by the Court in *Leatherman*." *Id.* As the court explained, although the *Leatherman* defendants argued, at the Supreme Court level, that multiple incidents must be pleaded, the Fifth Circuit in *Leatherman* found the complaint deficient for failure to plead sufficient underlying facts with respect to the policies alleged to have caused the two incidents that were the subject of plaintiffs' complaint. *Id.* at 338-39. The Fourth Circuit concluded, however, that

> [a]lthough the Court never referenced a requirement of pleading multiple incidents in its description of the Fifth Circuit's standard or in its analysis, it is apparent that the several-paragraph discussion following its statement of respondents' specific contention that multiple incidents must be pleaded was intended as a direct response to that contention.

Id. at 339.

56. *Id.* The Fourth Circuit was careful to reserve opinion of the question left unanswered by the Supreme Court, whether a heightened pleading standard might be justified in individual capacity suits where qualified immunity is available. *Id.* at 339 n.5.

57. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1163 (1993).

58. *Jordan by Jordan*, 15 F.3d at 340.

District courts should continue to exercise their discretion to deny discovery that amounts to "little more than fishing expeditions."[59] Furthermore, the Fourth Circuit emphasized that it is the responsibility of district court judges to award summary judgment against plaintiffs when it is clear they are unable to prevail on their substantive claims against municipalities.[60] The court concluded by exhorting lower courts not to view *Leatherman*'s breadth as denigrating the procedural tools that exist in the Federal Rules to stymie the "explosion of meritless lawsuits in the federal court system."[61]

Based on *Leatherman* and the pleading principles expounded in that case, the Fourth Circuit determined that the Jordans' complaint was sufficient to withstand a motion to dismiss.[62] The court stressed, however, that *Leatherman* merely allowed the plaintiffs to proceed to the summary judgment stage, where more stringent requirements would have to be overcome to prevail.[63]

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59. *Id.*

60. *Id.*

61. *Id.* Other courts have similarly expressed the sentiment that *Leatherman* should not be construed so as to leave district courts procedurally less equipped to deal with non-meritorious claims. The United States District Court for the District of New Hampshire observed in Quimby v. Division for Children & Youth Services., No. CIV.93-351-B, 1994 WL 258576, at *2-3 (D.N.H. Mar. 31, 1994) that:

> Care is required in determining the sufficiency of a complaint to insure that "heightened pleading" requirements are invoked only if such requirements are specifically authorized by the Federal Rules of Civil Procedure. However, even under the general pleading requirements of Fed.R.Civ.P. 8(a), a complaint will not withstand a motion to dismiss if the plaintiff has merely recited the elements of the complaint's causes of action in conclusory terms. Notice pleadings require factual allegations which, if true, will establish all of the required elements of plaintiff's causes of action. Moreover, where it is evident from plaintiff's response to a motion to dismiss that the complaint cannot be amended to allege such facts, a court may deny the plaintiff leave to amend and dismiss the complaint.

Id. (citations omitted). Similarly, in Feliciano v. Dubois, 846 F. Supp. 1033 (D. Mass. 1994), the United States District Court for the District of Massachusetts stated:

> [E]ven if *Leatherman* were construed as precluding a court from requiring of plaintiffs *an amended complaint* that met particularity-of-claim requirements, it probably should not be construed as precluding a court from making an early case management order requiring that, in *some form of written submission to the court* . . . the plaintiff clarify ambiguous claims to enable opposing parties and the court to evaluate jurisdictional and other potentially dispositive issues.

Id. at 1043.

62. *Jordan by Jordan*, 15 F.3d at 340. The complaint essentially alleged that the county defendants had an official policy or custom of inadequately training employees in determining the need for summary removal, encouraged the removal of any child left alone, and condoned improper conduct of their social workers. *Id.* The Jordans alleged that such policies caused the unconstitutional removal of Christopher from his parents' custody. *Id.*

63. *Id.* at 340-41.

III. Individual Capacity Suits and the Qualified Immunity Defense

A. *Pre*-Leatherman

When notice pleading encounters individual officials' qualified immunity from suit in section 1983 cases, the courts are presented with what has been referred to as the task of "accommodat[ing] an exquisite confrontation."[64] The resolution of this confrontation depends upon how a court characterizes the immunity defense, the claim asserted in the conflict, and whether the court perceives a conflict at all.

In *Elliott v. Perez*,[65] the United States Court of Appeals for the Fifth Circuit observed that "[t]he public goals sought by official immunity are not procedural. Indeed, they go to very fundamental substantive objectives."[66] As such, the immunity defense embodies a substantive right that cannot be abridged, modified, or enlarged by a Federal Rule.[67] To the extent that Rule 8(a)(2) authorizes mere notice pleading, with reliance on liberal use of discovery to uncover facts in support of plaintiff's claim, the Fifth Circuit determined that the Rule must be tailored to assure the defendant's substantive right to "be freed from the burdens, the stress, the anxieties and the diversions of pretrial preparations."[68] Thus, the majority of the panel in *Elliott* viewed heightened pleading as a judicial adaptation of a rule of procedure necessary to avoid the abridgement of a substantive right.

Judge Higginbotham, concurring specially with the Fifth Circuit decision, was uncomfortable with judicially tinkering with legislative determi-

64. Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985) (Higginbotham, J., concurring specially). As Judge Easterbrook appropriately questioned, "How is it possible simultaneously to preserve remedies for egregious wrongdoing and nip in the bud efforts to prolong the agony of defendants who are fated to win under *Harlow*?" Elliott v. Thomas, 937 F.2d 338, 344 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992).

65. 751 F.2d at 1472.

66. *Id.* at 1479.

67. 28 U.S.C. § 2072 (1988). The Rules Enabling Act provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Id.; *see also* Schultea v. Wood, No. 93-2186, 1995 WL 98234, at *10 (5th Cir. Mar. 9, 1995) (en banc) (Jones, Edith H., J., joined by Jolly, J., and Barksdale, J., specially concurring) (arguing that "[t]o the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity").

68. *Elliott*, 751 F.2d at 1479.

nations reflected in the Federal Rules.[69] Rather than approaching the problem from the perspective of adapting Rule 8(a)(2), Judge Higginbotham found the solution in carefully defining the contours of a well-pleaded claim. As he explained, "[i]f immunity protects a defendant from the discovery process, . . . and the statement of a claim grants access to that process, as it does under notice pleading, then a well-pleaded claim must overcome the immunity."[70] The fact that, undoubtedly, some meritorious claims will be precluded by a plaintiff's inability to conduct discovery is an inevitable byproduct of the policy considerations weighed when the substantive defense originally was made available to public officials.[71] Thus, Judge Higginbotham reached the same conclusion as the majority of the panel in *Elliott*, but did so by incorporating the requirement of overcoming the immunity defense in the complaint as a function of providing allegations that comply with the meaning of Rule 8(a)(2).[72]

In *Elliott*, neither the majority nor Judge Higginbotham made any reference to *Gomez v. Toledo*,[73] where the Supreme Court held that qualified immunity is an affirmative defense that need not be anticipated by the plaintiff in his complaint.[74] In *Elliott v. Thomas*,[75] Judge Easterbrook writing for the Seventh Circuit, noting the holding of *Gomez* and the apparent conflict between a heightened pleading requirement and Rules 8 and 9(b), concluded it was "misleading to speak of a 'heightened *pleading* requirement.' "[76] *Gomez* made clear that the plaintiff in a section 1983 suit need not do anything in the complaint other than get beyond Rules 8 and 9(b).[77] Once the defendant has responded to the complaint by rais-

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69. *See id.* at 1483 (Higginbotham, J., concurring specially). Judge Higginbotham explained, "I do not know where we find the authority to add the requirement [to Rule 9(b)] that claims against officials who enjoy immunity from suit shall be pled with particularity." *Id.*

70. *Id.*

71. *Id.* This view has received post-*Leatherman* support in Wicks v. Mississippi State Employment Services, 41 F.3d 991, 994-95 (5th Cir. 1995), where the court insisted that plaintiff meet the heightened pleading requirement to survive a motion to dismiss before even limited discovery on the immunity issue would be allowed. *Id.*

72. *Id.*

73. 446 U.S. 635 (1980).

74. *Id.* at 640; *see also* Siegert v. Gilley, 500 U.S. 226, 231 (1991) (reaffirming *Gomez*). *Gomez* is addressed by the Fifth Circuit in Schultea v. Wood, No. 93-2186, 1995 WL 98234, at *4 (5th Cir. Mar. 9, 1995) (en banc). *See infra* note 98.

75. 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992). *Elliott v. Thomas* was one of two cases consolidated for appeal. *Id.* at 340-41. Most of the issues discussed arose in the companion case of *Propst v. Weir*. *Id.* To avoid confusion with the Fifth Circuit's decision in *Elliott*, the Seventh Circuit case will be referred to as *Thomas*.

76. *Id.* at 345. He also had trouble with the tactic of characterizing the " 'right not to be tried' " as substantive, rather than procedural. *Id.*

77. *Id.*

ing the defense of qualified immunity and moving for summary judgment, Rule 56[78] comes into play. Then, the matter is no longer what is required in the initial complaint, but rather what is required to overcome a motion for summary judgement.[79] Judge Easterbrook concluded that to clear the initial summary judgment hurdle and be allowed to pursue discovery in a case implicating qualified immunity, the plaintiff should be required to produce "some evidence"[80] to support the claim in the form of " 'specific, nonconclusory factual allegations.' "[81]

B. Siegert *and* Leatherman

In *Siegert v. Gilley*,[82] a clinical psychiatrist employed by the federal government brought a *Bivens* action[83] against his former supervisor.[84] He claimed that an allegedly defamatory letter authored by the defendant harmed his future employment prospects.[85] The United States Court of Appeals for the District of Columbia Circuit reversed the federal district court's denial of qualified immunity to defendant Gilley and remanded with orders that the case be dismissed for failure to satisfy that circuit's heightened pleading standard.[86] The District of Columbia Circuit, where state of mind is an essential ingredient of plaintiff's claim, required plaintiff to plead "specific *direct* evidence of intent to defeat a motion to dismiss."[87] Although the Supreme Court granted *certiorari* in *Siegert* to resolve the question of heightened pleading in a case implicating the qualified immunity defense, the majority ultimately disposed of the case without deciding the propriety of the circuit's direct evidence requirement. The court concluded that even if direct evidence of motive

78. Rule 56 governs summary judgment procedure in the federal district courts. FED. R. CIV. P. 56. Rule 56(b) allows a defendant to move for summary judgment "at any time." *Id.* at 56(b).

79. *Thomas*, 937 F.2d at 345.

80. *Id.*

81. *Id.* at 346 (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

82. 500 U.S. 226 (1991).

83. When a plaintiff asserts that his constitutional rights have been violated by an official acting under color of federal law, as opposed to state law, a *Bivens* action is the counterpart to a section 1983 action, with the right and the remedy being derived directly from the Constitution. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971).

84. *Siegert*, 500 U.S. at 229.

85. *Id.* at 227-29.

86. *Id.* at 230-31.

87. Kimberlin v. Quinlan, 6 F.3d 789, 793 (D.C. Cir. 1993), *cert. granted*, 115 S. Ct. 929 (1995); *see* Siegert v. Gilley, 895 F.2d 797, 801-02 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991); Whitacre v. Davey, 890 F.2d 1168, 1169 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990).

had been pleaded, the complaint failed to allege the violation of any constitutional right.[88]

Justice Kennedy, concurring in the judgment, would have affirmed the judgment for the reasons relied upon by the District of Columbia Circuit.[89] While acknowledging that heightened pleading represents a departure from the requirements of Rules 8 and 9(b), Justice Kennedy nonetheless characterized qualified immunity as a substantive defense that overrides procedural rules.[90] Finding that the heightened pleading standard balances "the state of mind component of malice and the objective test that prevails in qualified immunity analysis," Justice Kennedy concluded that "[u]pon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal."[91]

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88. *Siegert*, 500 U.S. at 233. Because plaintiff had voluntarily resigned from his position and the allegedly defamatory letter was unrelated to plaintiff's termination of employment at the hospital, the Court concluded that plaintiff did not suffer constitutional injury under Paul v. Davis, 424 U.S. 693 (1976). *Siegert*, 500 U.S. at 233-34.

89. *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring). Justice Kennedy criticized the approach adopted by the majority, which instructs trial and appellate courts to resolve the constitutional issue, of whether the plaintiff has asserted the violation of a constitutional right, before determining whether the right was clearly established at the time of the challenged conduct or whether plaintiff has satisfied the circuit's heightened pleading requirements. *Id.*

Post-*Siegert*, courts of appeals have taken different views as to whether the analytical structure set out in *Siegert* for addressing claims of qualified immunity is discretionary or mandatory. *Compare* Romero v. Fay, No. 94-2042, 1995 WL 31861, at *6 (10th Cir. Jan. 25, 1995) (holding *Siegert* mandates that district courts first ascertain whether the plaintiff asserts facts that establish the violation of a constitutional right at all) *and* Macias v. Raul A. (Unknown), 23 F.3d 94, 98 (5th Cir.) (interpreting "*Siegert* as first requiring the determination whether the plaintiff has stated a constitutional violation before reaching the qualified immunity issue"), *cert. denied*, 115 S. Ct. 220 (1994) *and* Silver v. Franklin Township, 966 F.2d 1031, 1035-36 (6th Cir. 1992) (viewing *Siegert* as issuing a "directive . . . that before reaching a qualified immunity issue a court should determine whether there has been a constitutional violation") *with* DiMeglio v. Haines, No. 94-1569, 1995 WL 40583, at *5 (4th Cir. Feb. 2, 1995) (holding that "*Siegert* did not mandate that courts determine, as a part of the qualified immunity analysis, whether the plaintiff has stated a claim upon which relief can be granted [or] . . . . require that courts decide the merits of the constitutional claim") *and* Spivey v. Elliott, 41 F.3d 1497, 1498 (11th Cir. 1995) (withdrawing a panel opinion that had decided the merits of the constitutional claim and stating that "[u]pon reconsideration on the suggestion of other members of this Court, we now think it enough to decide that there was no clearly established constitutional right allegedly violated by the defendants") *and* Acierno v. Cloutier, 40 F.3d 597, 606 n.7 (3d Cir. 1994) (en banc) (noting that *Siegert* does not hold "that courts of appeals *must always* as an initial inquiry address whether a constitutional violation has been alleged by the plaintiff").

90. *Siegert*, 500 U.S. at 236.

91. *Id.* at 235-36. Significantly, Justice Kennedy rejected the District of Columbia Circuit's requirement that the plaintiff plead only direct as opposed to circumstantial evidence of intent. *Id.* at 236.

Justice Marshall, in a dissent joined by Justices Blackmun and Stevens, disagreed with the majority's conclusion that Siegert had not stated a justiciable constitutional claim.[92] The dissent also addressed the question of whether a heightened pleading standard must be satisfied before discovery can be undertaken in individual capacity suits in which malice is alleged and qualified immunity is raised as a defense.[93] Finding the District of Columbia Circuit's direct evidence requirement lacking in precedent or common sense, the dissent was of the view that "a plaintiff pleading a *Bivens* claim that requires proof of the defendant's intent should be afforded such discovery whenever the plaintiff has gone beyond bare, conclusory allegations of unconstitutional purpose."[94]

In *Leatherman*, the Supreme Court expressly reserved the question of whether qualified immunity jurisprudence requires heightened pleading in cases involving individual government officials.[95] Thus, in terms of insight into the Supreme Court's position on heightened pleading in the qualified immunity context, the significance of *Siegert* and *Leatherman* is limited. Two currently sitting Supreme Court Justices have rejected the District of Columbia Circuit's requirement that a plaintiff plead direct evidence of intent when state of mind is an element of the underlying constitutional claim.[96] Both Justices, however, would require plaintiff to plead more than "conclusory allegations of unconstitutional purpose" to avoid dismissal and initiate discovery.[97]

C. *Post*-Leatherman

In the wake of *Leatherman* and the Supreme Court's express reservation with respect to the application of *Leatherman* to individual capacity claims, lower federal courts predictably have reached conflicting conclusions as to the scope of the rationale underlying the Court's decision. As of this Article, only three courts of appeals have addressed the issue in more than a perfunctory manner.[98] Examination of these cases uncovers

92. *Id.* at 239 (Marshall, J., joined by Justice Blackmun and Justice Stevens as to Parts II and III, dissenting).

93. *Id.* at 238 (suggesting that because the case presented no unusual circumstances, the issue not addressed in the petition for *certiorari* should go unheard).

94. *Id.* at 246.

95. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1162 (1993).

96. *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring); *id.* at 246 (Stevens, J., joining in dissent).

97. *Id.* at 246 (Stevens, J., joining in dissent).

98. *See* Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457 (9th Cir. 1994); Branch v. Tunnell, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994); Triad Assocs., Inc. v. Robinson, 10 F.3d 492 (7th Cir. 1993); Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir.

1993), *cert. granted*, 115 S. Ct. 929 (1995); Moore v. Agency for Int'l Dev., 994 F.2d 874 (D.C. Cir. 1993).

After this Article was in page proofs, the Court of Appeals for the Fifth Circuit rendered an en banc opinion in Schultea v. Wood, No. 93-2186, 1995 WL 98234 (5th Cir. Mar. 9, 1995) (en banc), in which the court revisited *Elliot* and the "heightened pleading" standard in qualified immunity cases in light of *Leatherman*. Judge Higginbotham, writing for the majority of the en banc court, announced a new approach to resolving the tension between qualified immunity jurisprudence and the Federal Rules. Instead of judicially legislating a particularity requirement that is not present in Rule 8 or Rule 9(b), the Fifth Circuit "will draw to center stage a judicial tool explicitly preserved by the Civil Rules, the reply. *See* Fed. R. Civ. P. 7(a)." 1995 WL 98234, at *3. The court has thus shifted the demand for particularity from the complaint to the reply, which ordinarily will be required when the immunity defense is raised by defendants. The court of appeals summarized this new approach as follows:

> Our answer to *Leatherman* is that the district court has an array of procedures that will carry the load as far as pleadings can. First, the district court must insist that a plaintiff suing a public official under § 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone. Second, the court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist. The district court may ban discovery at this threshold pleading stage and may limit any necessary discovery to the defense of qualified immunity. The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts. Even if such limited discovery is allowed, at its end, the court can again determine whether the case can proceed and consider any motions for summary judgment under Rule 56.

Id. at *7. The minority of the en banc court found Judge Higginbotham's resurrection of the Rule 7 reply a "novel and interesting" approach to the problem, but supported the continued validity and applicability of *Elliott's* "heightened pleading" requirement. 1995 WL 98234, at *8 (Jones, Edith H., J., joined by Jolly, J., and Barksdale, J., specially concurring); 1995 WL 98234, at *11 (Garza, Emilio M., J., specially concurring).

In Cameron v. Seitz, 38 F.3d 264 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit recently noted, without reference to *Leatherman*, that

> [o]ne of the purposes of qualified immunity is to protect government officials from the exigencies of litigation. Thus, normally a civil rights plaintiff should include in the original complaint all of the factual allegations necessary to sustain a conclusion that the defendant violated clearly established law. Failure to do so, however, is not fatal; the district court should allow the plaintiff an opportunity to come forward with additional facts or allegations showing that rights were violated and that those rights were clearly established. Failure at that point to plead such facts or allegations, however, would make summary judgment or a motion to dismiss on the ground of qualified immunity appropriate.

Id. at 272 n.2 (citations omitted); *see also* Castro v. United States, 34 F.3d 106, 111 (2d Cir. 1994) (finding that "qualified immunity is an affirmative defense that a defendant has the burden of pleading in his answer" and that to state a claim of constitutional violation, a plaintiff "need not plead facts showing the absence of such a defense"); Babb v. Dorman, 33 F.3d 472, 477-78 (5th Cir. 1994) (declin[ing] "to read into *Leatherman* any change in the law respecting actions against individual municipal defendants and conclud[ing] that [it is] still bound by *Elliott* and its progeny in determining whether [plaintiff] stated a claim against [defendant]" given the express reservation of individual capacity claims and apply-

no consensus as to whether, or to what extent, heightened pleading may remain a requirement after *Leatherman*.

In *Triad Associates, Inc. v. Robinson*,[99] plaintiff corporations, which provided security services, alleged that the defendant, the Chairman of the Board of Commissioners of the Chicago Housing Authority (CHA), intentionally discriminated against white owned security companies.[100] The defendant appealed from the district court's denial of a motion to dismiss based on qualified immunity,[101] arguing that Triad failed to allege discriminatory intent with the requisite specificity.[102] Considering it perfectly appropriate to review the sufficiency of the complaint as to allegations of intent, when intent is an essential element of the claimed constitutional injury, the United States Court of Appeals for the Seventh Circuit announced that no special pleading standard is required in qualified immunity cases to survive a motion to dismiss.[103]

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ing *Elliott*'s heightened pleading requirement); Schultea v. Wood, 27 F.3d 1112, 1115 n.2 (5th Cir. 1994) (applying the heightened pleading standard because "the Supreme Court in *Leatherman* did not 'consider whether [its] qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials' " and rejecting plaintiff's contention that the liberal system of pleading is sufficient (alteration in original)), *aff'd in part and rev'd in part*, 47 F.3d 1427 (5th Cir. 1995) (en banc); Tompkins v. Vickers, 26 F.3d 603, 608 n.3 (5th Cir. 1994) (declining to discuss what the plaintiff must include in his complaint); Wayfield v. Town of Tisbury, No. 93-1535, 1993 WL 487830, at *1 (1st Cir. Nov. 29, 1993) (indicating civil rights complaints need not be plead with heightened particularity), *cert. denied*, 114 S. Ct. 2764 (1994); Williams v. Alabama State Univ., 865 F. Supp. 789, 799 n.3 (M.D. Ala. 1994) (holding *Leatherman* calls into question the propriety of using heightened pleading in a section 1983 case, but deciding to use a heightened pleading standard in this case because the plaintiff did not bring suit against a municipality); Ohio Council of the Blind v. Voinovich, No. C2-93-528, 1994 WL 504405, at *4 (S.D. Ohio Mar. 28, 1994) (noting that the Sixth Circuit has not had an occasion to address the issue of heightened pleading after the *Leatherman* decision, but observing that "at least one district court within the Sixth Circuit has concluded that heightened pleading is no longer required in an action where qualified immunity is an anticipated defense").

99. 10 F.3d 492 (7th Cir. 1993).

100. *Id.* at 495.

101. *Id.* A denial of qualified immunity is immediately appealable "to the extent that it turns on an issue of law." Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

102. *Triad*, 10 F.3d at 496.

103. *Id.* at 497. The Seventh Circuit stated:

> in this circuit on a motion to dismiss we require no more from plaintiffs' allegations of intent than what would satisfy Rule 8's notice pleading minimum and Rule 9(b)'s requirement that motive and intent be pleaded generally. In qualified immunity cases there is no special pleading standard that need be satisfied to survive a motion to dismiss.

Id. (citations omitted). The court did acknowledge that *Thomas* would require plaintiff to produce a " 'minimum quantum of proof' " of discriminatory intent to defeat a motion for summary judgment. *Id.* at 497 n.3; *see also* Palmer v. Board of Educ., Nos. 93-3591, 94-1229, 1995 WL 42819, at *7 (7th Cir. Feb. 3, 1995) (confirming the circuit's view that a civil rights plaintiff need not plead specific facts and suggesting that development of details be left for later stages of litigation).

The Seventh Circuit's position, as articulated in *Triad*, stands at one end of the spectrum in post-*Leatherman* decisions.[104] Simply, there are no special pleading requirements for section 1983 claims, even in individual capacity suits where state of mind is at issue. While neither the Third Circuit nor the Tenth Circuit has addressed the issue of heightened pleading in individual capacity suits since *Leatherman*, a number of district court opinions from those circuits are in accord with the position adopted by the Seventh Circuit.[105]

At the opposite end of the spectrum, the District of Columbia Circuit stands alone in applying a heightened pleading standard to all individual capacity suits.[106] This standard is applied in conjunction with the require-

104. *See* Tuite v. Henry, No. 93 C 3248, 1994 WL 55711, at *4 (N.D. Ill. Feb. 22, 1994) (concluding that "*Triad* seems to resolve conclusively any lingering doubt about whether the pleading requirement in this case is anything but the liberal standard set out in Rule 8"); *see also* Carney v. White, 843 F. Supp. 462, 470 (E.D. Wis. 1994) (finding that since *Leatherman*, a heightened pleading requirement is inappropriate for section 1983 suits); Stein v. Forest Preserve Dist., 829 F. Supp. 251, 258 (N.D. Ill. 1993) (explaining that "a plaintiff's burden at the pleading stage is minimal" and that "as long as [plaintiff] asserts some facts which either directly or circumstantially support a finding that [defendant] intentionally sought to deprive him of his protectable property interest, [plaintiff] can avoid dismissal on immunity grounds before discovery").

105. District court decisions in the Tenth Circuit adopting the Seventh Circuit's position are the following: Gardetto v. Mason, 854 F. Supp. 1520, 1529 n.4 (D. Wyo. 1994) (noting that "the plaintiff's complaint cannot be subjected to any type of 'heightened pleading requirement' so as to defeat the defendant's anticipated claim of qualified immunity"); Sapp v. Cunningham, 847 F. Supp. 893, 900 & n.9 (D. Wyo. 1994) (same).

District Court decisions in the Third Circuit adopting the Seventh Circuit's position are the following: Loftus v. Southeastern Pa. Transp. Auth., 843 F. Supp. 981, 985 n.4 (E.D. Pa. 1994) (noting that "[m]ost courts in the district . . . appear to have read *Leatherman* to have eliminated the requirement of 'heightened specificity' in all § 1983 actions including those against individual government officials"); McCallen v. Holland-Hull, No. Civ.A.93-3415, 1994 WL 34251, at *1 (E.D. Pa. Jan. 31, 1994) (stating that *Leatherman* compels rejection of any use of a heightened pleading standard in section 1983 cases even though it "explicitly does not address pleading standards in civil rights cases against non-municipal defendants"); Timmons v. Cisneros, No. Civ.A.93-1854, 1993 WL 276863, at *1 (E.D. Pa. July 22, 1993) (noting the "the rationale of *Leatherman* would appear to apply equally to the case of an official employed by a municipality"); Johnson v. Lancaster County Children & Youth Social Serv. Agency, No. Civ.A.92-7135, 1993 WL 245280, at *9 (E.D. Pa. July 2, 1993) (holding that a "federal court may not apply a 'heightened pleading standard' " in a civil rights action, but it must follow the normal pleading requirements of Rule 8(a)). *But see* Biase v. Kaplan, 852 F. Supp. 268, 287 n.15 (D.N.J. 1994) (requiring the plaintiff to plead specific, nonconclusory allegations of unlawful intent and finding that nowhere in *Leatherman* did the Supreme Court obviate the need for heightened pleading in a *Bivens* action).

106. *See, e.g.*, Hunter v. District of Columbia, 943 F.2d 69, 76-77 (D.C. Cir. 1991) ("When a plaintiff claims that an officer used excessive force, the heightened pleading standard demands that he make 'nonconclusory allegations of evidence' sufficient to demonstrate that the force used actually was unreasonable."). Although malice or impermissible motive need not be alleged to state a Fourth Amendment excessive force claim, *see gener-*

ment that, in those suits in which state of mind is at issue, the complaint must contain allegations of direct evidence of intent or unconstitutional motive to withstand a motion to dismiss.[107]

In *Kimberlin v. Quinlan*,[108] the plaintiff was a federal prisoner who announced to the news media, just prior to the 1988 presidential election, that he once had sold marijuana to vice-presidential candidate Dan Quayle when Quayle was a law student.[109] Following this announcement, NBC News requested and was granted an interview with Kimberlin. Many other interview requests resulted, causing the Acting Warden initially to schedule a press conference for Kimberlin. The defendant Quinlan, the Director of the Bureau of Prisons, canceled the press conference because he prohibited press conferences by prisoners.[110] Subsequently, Kimberlin was held in administrative detention on three different occasions, twice before the November 8, 1988 election and once on December 22, 1988.[111]

Kimberlin brought a *Bivens* action against Quinlan and Miller, the Director of Public Affairs at the Department of Justice, alleging that his administrative detention on the first two occasions was an attempt to deny him access to the news media and the third detention was in retaliation for his communication with the media.[112] Kimberlin claimed that the defendants violated his First and Fifth Amendment rights.[113] The federal district court denied defendants' alternative motion to dismiss or for summary judgment based on qualified immunity.[114] The defendants appealed, claiming that in each instance of administrative detention their conduct was objectively reasonable under the facts as set forth in the record.[115]

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ally Graham v. Connor, 490 U.S. 386 (1989), and Tennessee v. Garner, 471 U.S. 1 (1985), the District of Columbia Circuit has required heightened pleading in that context.

107. Kimberlin v. Quinlan, 6 F.3d 789, 793 (D.C. Cir. 1993), *cert. granted*, 115 S. Ct. 929 (1995). In Kartseva v. Department of State, 37 F.3d 1524 (D.C. Cir. 1994), Judge Wald noted the District of Columbia Circuit applies two levels of heightened pleading. *Id.* at 1531. Level one applies to *Bivens* and section 1983 claims, and level two applies in cases which the defendant's state of mind is at issue. *Id.*

108. 6 F.3d at 789.

109. *Id.* at 791.

110. *Id.*

111. *Id.* at 792.

112. *Id.* at 790-91, 793.

113. *Id.* at 790-91.

114. *Id.* The District of Columbia Circuit noted that it was treating the motion as one for summary judgment "[b]ecause the parties submitted and the district court considered materials outside the pleadings." *Id.* at 793 n.7.

115. *Id.* at 793. Defendants had submitted evidence to support their contention that they placed Kimberlin in administrative detention once for his own protection and twice for violating the prison regulation against third-party telephone calls. *See id.* at 792-93.

The District of Columbia Circuit noted that circuit precedent[116] required "pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment"[117] and that Kimberlin had failed to satisfy this burden. Consequently, the District of Columbia Circuit reversed the district court's denial of summary judgment based on qualified immunity.[118] The majority in *Kimberlin* treated the defendants' motion as one for summary judgment,[119] agreeing with the Seventh Circuit in *Thomas* that at the summary judgment stage the terminology " 'heightened pleading' " is a misnomer, and the requirement is more accurately depicted as one of " 'heightened production.' "[120]

Unlike the Seventh Circuit, however, the District of Columbia Circuit does apply a heightened *pleading* standard when the defendant simply files a motion to dismiss. The *Kimberlin* court described the circuit's standard as one that required a plaintiff to "plead or produce, depending on the stage of litigation, direct evidence of unconstitutional intent."[121] The court justified the standard as necessary to give effect to the immunity from suit that is afforded to objectively reasonable behavior of government officials.[122] As Judge Williams explained, "[t]he restriction arose out of an effort to reconcile conflicting goals: to protect officials

116. *Id.* at 794 (citing Siegert v. Gilley, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991); Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990); Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987); Martin v. District of Columbia Metro. Police Dep't, 812 F.2d 1425 (D.C. Cir. 1987); Smith v. Nixon, 807 F.2d 197 (D.C. Cir. 1986); Hobson v. Wilson, 737 F.2d 1 (1984), *cert. denied*, 470 U.S. 1084 (1985)).

117. *Id.* at 793-94.

118. *Id.* at 797-98. The court characterized the evidence relied on by Kimberlin as mere "inference and weak circumstantial evidence." *Id.* at 797.

119. *Id.* at 793 n.7.

120. *Id.* at 794 n.8 (citing Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992)); *see also* Kimberlin v. Quinlan, 17 F.3d 1525, 1525 n.1 (D.C. Cir. 1994) (*on appellee's suggestion for rehearing in banc*) (Williams, J.) (explaining that although the circuit's direct evidence rule is a variation of a heightened pleading standard, "in fact the 'standard' normally has nothing to do with pleading, but simply allows summary judgment to be granted before the plaintiff has had as great an opportunity to subject defendant to discovery as is conventionally available").

121. *Kimberlin*, 6 F.3d at 796 n.12. The District of Columbia Circuit acknowledged that, while most other circuits had adopted a form of heightened pleading in individual capacity suits, "the direct/circumstantial distinction" employed by the District of Columbia Circuit had not been adopted elsewhere. *Id.* at 794. In fact, as Judge Williams notes in his concurring opinion, the only circuits to consider the direct evidence rule explicitly have rejected it. *Id.* at 798 (Williams, J., concurring) (citing Branch v. Tunnell, 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Elliott*, 937 F.2d at 344-45)); *see* Crutcher v. Kentucky, 883 F.2d 502, 504 (6th Cir. 1989).

122. *Kimberlin*, 6 F.3d at 793.

with qualified immunity from undue litigation burdens and to afford legal remedies for citizens whose rights may have been abused."[123]

Judge Edwards, writing a strong dissent in *Kimberlin*, first questioned the validity, post-*Leatherman*, of any heightened pleading standard not authorized by the Federal Rules.[124] Second, he criticized the District of Columbia Circuit's unique " 'direct evidence rule' " as having "no foundation in reason or in the case law."[125] According to the dissent, the rationale of the Supreme Court's decision in *Leatherman*, which finds standards of heightened pleading basically incompatible with the liberal notice pleading requirements of Rules 8(a) and 9(b), "casts doubt on the validity of *any* judge-made 'heightened pleading' standard imposed in *any* context."[126]

Even assuming some level of heightened pleading could be justified in individual capacity suits involving the qualified immunity defense, the dissent aptly characterizes the direct evidence requirement as "a cynical perversion of this court's responsibility to strike a balance between the 'evils inevitable' in resolving immunity questions—the evil of shutting out meritorious civil rights claims, and the evil of exposing Government officials to the burdens of litigation and liability."[127] Placing a burden upon the plaintiff in a civil rights action of pleading direct evidence of unconstitutional motive "would be fatal in all but the rare case in which the defendant confessed."[128] The dissent correctly concludes that the direct

123. *Id.* at 798 (Williams, J., concurring).

124. *Id.* at 799, 804 (Edwards, J., dissenting).

125. *Id.* at 799. Judge Edwards reviewed the circuit's decisions that allegedly formed the basis for the direct evidence rule and demonstrated persuasively that the circuit's precedents reflect considerable confusion as to the precise formulation of the heightened pleading standard. *Id.* at 805-08; *see also* Kimberlin v. Quinlan, 17 F.3d 1525, 1528 (D.C. Cir. 1994) (Edwards, J., joined by Mikva, C.J., and Wald, J., dissenting from the denial of the suggestion for rehearing en banc) ("At best . . . the law of the circuit is in disarray, and *en banc* review is needed to repair this situation.").

126. *Kimberlin*, 6 F.3d at 799. Judge Edwards concluded that "[t]he Court's decision in *Leatherman* thus employs a strict reading of Rules 8 and 9 that suggests strongly that any heightened pleading standard is *impossible to square* with the Rules, and is therefore invalid." *Id.* at 804.

127. *Id.* at 810 (citing Harlow v Fitzgerald, 457 U.S. 800, 813-14 (1982)).

128. Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992); *see also* Siegert v. Gilley, 500 U.S. 226, 246 (1991) (Marshall, J., joined by Blackmun, J., and Stevens, J., dissenting) (arguing because evidence of unconstitutional intent is controlled by the defendant, any use of a heightened pleading rule in a *Bivens* action when defendant's state of mind is an essential element of the plaintiff's claim would be inappropriate). In a recent opinion from the United States District Court for the District of Columbia, the court voiced its concerns about that circuit's direct evidence rule:

> To survive a defense of qualified immunity, a claim of a constitutional violation by a government official which turns on the official's motive must meet the heightened pleading standard established in this Circuit. . . .

evidence rule, with its requirement that plaintiffs "provide more evidence at the pleading stage than is required to win the case at trial,"[129] cannot be interpreted as an effort to balance competing concerns underlying the qualified immunity defense. Instead, it can only be viewed as an "irrational and arbitrary" device that, when it applies, slams the courthouse doors in the plaintiff's face.[130] Should a form of heightened pleading, when qualified immunity is in issue, eventually survive Supreme Court scrutiny, common sense and fairness would dictate that the District of Columbia Circuit's direct evidence rule should be soundly rejected.

The Ninth Circuit's post-*Leatherman* decisions place that circuit roughly at the midpoint of the spectrum between the positions adopted by the Seventh Circuit and the District of Columbia Circuit. In *Branch v. Tunnell* (*Branch I*),[131] a pre-*Leatherman* case, plaintiffs brought a *Bivens* action against Tunnell, a Special Agent with the Department of the Interior's Bureau of Land Management. Branch claimed that Tunnell had violated his Fourth Amendment rights by knowingly or recklessly making false statements in an affidavit presented to the magistrate judge while procuring warrants to search Branch's home and business.[132] The district court denied defendant's motion to dismiss based on qualified immunity grounds.[133] The Ninth Circuit reversed, holding that when subjective intent is an element of plaintiff's underlying constitutional claim, a heightened pleading standard must be satisfied.[134] The Ninth Circuit held that to survive a motion to dismiss, plaintiffs must plead in their complaint

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. . . .

> [D]irect evidence of unconstitutional intent is very hard to plead or produce, especially without the benefit of discovery. With the best evidence of unconstitutional motive often under defendants' control, plaintiffs are rarely in a position to plead or produce enough direct evidence to meet the heightened pleading standard. In fact, the heightened pleading standard appears to block all cases in which the defendants do not baldly state their unconstitutional motives, since even tremendous amounts of circumstantial evidence do not suffice.

Crawford-El v. Britton, 844 F. Supp. 795, 802 (D.D.C. 1994) (citations omitted).

129. *Kimberlin*, 6 F.3d at 809 (Edwards, J., dissenting); *see also Kimberlin*, 17 F.3d at 1527 (Edwards, J., joined by Mikva, C.J., and Wald, J., dissenting from the denial of the suggestion for rehearing en banc) (disagreeing with the use of heightened pleading specificity in civil rights cases because it requires plaintiffs to "prove more to survive a motion to dismiss than he or she must prove in order to win at trial").

130. *Kimberlin*, 17 F.3d at 1529 (Edwards, J., joined by Mikva, C.J., and Wald, J., dissenting from the denial of the suggestion for rehearing en banc).

131. 937 F.2d 1382 (9th Cir. 1991).

132. *Id.* at 1383-84, 1387. The Bureau of Land Management was investigating *Branch* to determine whether he was avoiding royalty payments on federal natural gas leases. *Id.* at 1383. No charges were ever filed against Branch. *Id.*

133. *Id.* at 1383.

134. *Id.* at 1386.

"nonconclusory allegations setting forth evidence of unlawful intent."[135] Expressly rejecting the District of Columbia Circuit's direct evidence rule, the Ninth Circuit concluded that its rule balanced the various concerns and interests of plaintiffs and government officials.[136]

The court emphasized that the standard it was announcing was a low one, intended to allow courts to weed out "insubstantial" claims prior to discovery.[137] It contrasted the minimal burden imposed by the heightened pleading standard with the significantly more rigorous standard imposed at the summary judgment stage.[138] Because the Ninth Circuit was adopting a new heightened pleading standard in *Branch I*, it remanded the case to the district court with instructions to permit the plaintiffs to amend their complaint.[139]

On remand, plaintiffs amended their complaint and Tunnell again moved to dismiss for failure to meet the heightened pleading standard announced in *Branch I*.[140] The district court granted the motion to dismiss, finding the complaint deficient because plaintiffs failed to allege facts demonstrating that Tunnell knew or should have known that the statements made in the warrant affidavit were false.[141] On appeal to the Ninth Circuit, Branch argued that his amended complaint satisfied the standard set out in *Branch I*.[142] Alternatively, Branch argued that if it were still deficient, the heightened pleading standard adopted by the Ninth Circuit should be overruled in light of the intervening Supreme Court decision in *Leatherman*.[143]

In *Branch v. Tunnell* (*Branch II*), the Ninth Circuit disagreed with both contentions.[144] The court found the complaint's allegations insufficient to demonstrate Tunnell knew or should have known that his statements to the magistrate were false.[145] It rejected plaintiffs' suggestion that *Leatherman* required the court to revisit the heightened pleading stan-

135. *Id.*

136. *Id.* at 1386-87. On the particular facts of *Branch I*, the Ninth Circuit concluded that because the claim in this case was one of judicial deception, the heightened pleading standard required plaintiffs to point to specific portions of the warrant affidavit they claimed to be false, allege "some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements," and allege that the false statements were necessary to the finding of probable cause by the magistrate judge. *Id.*

137. *Id.*

138. *Id.* at 1387-88.

139. *Id.*

140. Branch v. Tunnell, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994).

141. *Id.*

142. *Id.*

143. *Id.* at 455.

144. *Id.*

145. *Id.*

dard it had adopted in *Branch I*.[146] While the court acknowledged Judge Edwards' view in *Kimberlin* concerning the scope of the *Leatherman* rationale,[147] the Supreme Court's express reservation of the issue of a heightened pleading standard in individual capacity suits left the Ninth Circuit without authority to reconsider *Branch I*.[148] Thus, adhering to the heightened pleading standard of *Branch I*, the Ninth Circuit affirmed the dismissal of the complaint.[149]

In *Mendocino Environmental Center v. Mendocino County*,[150] a case decided the same day as *Branch II*, the Ninth Circuit clarified that its heightened pleading standard is applicable only in cases in which state of mind is an essential element of the underlying constitutional tort.[151] Should the defendant's subjective intent be irrelevant to the constitutional claim, normal pleading rules and standards apply in deciding a motion to dismiss.[152]

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146. *Id.*

147. *Id.* at 457 (observing that "the Supreme Court's rationale—the *expressio unius* rule—would appear to apply in *any* case outside the fraud or mistake context in which federal courts have applied heightened pleading rules").

148. *Id.* at 456. The Ninth Circuit noted the general rule that " 'one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.' " *Id.* (quoting United States v. Gay, 967 F.2d 322, 327 (9th Cir.), *cert. denied*, 113 S. Ct. 359 (1992)). Because of the Supreme Court's explicit limitation of its decision in *Leatherman* to municipal liability cases, an exception to the general rule that "arises when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit," did not come into play. *Id.*

While federal district courts in the Ninth Circuit will be obliged to follow *Branch I* and *Branch II*, it remains unclear whether there is agreement in the circuit about the extent to which *Leatherman* might be interpreted as undermining existing precedent. *See* Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1448-49 (9th Cir. 1994) (explaining that the Supreme Court has rejected a heightened pleading standard and has noted the imposition of a heightened pleading standard must be undertaken by amending Rules 8 and 9, thereby making *Leatherman*'s impact unclear). *But see* Kruse v. Hawaii, 857 F. Supp. 741, 750 (D. Haw. 1994) ("Given the *Branch II* court's extensive and thoughtful treatment of *Leatherman*'s impact on the heightened pleading standard in § 1983 actions against individuals, this court rejects plaintiffs' contention that this standard has a questionable, let alone dubious, status in this circuit").

149. *Branch*, 14 F.3d at 457.

150. 14 F.3d 457 (9th Cir. 1994).

151. *Id.* at 462.

152. *Id.* at 461-62; *see also* Housley v. United States, 35 F.3d 400, 401-02 (9th Cir. 1994) (finding the heightened pleading requirement of *Branch I* does not apply to defendant because his subjective intent is not an element of his *Bivens* claim).

The United States District Court for the Northern District of Texas in Todd v. Hawk, 861 F. Supp. 35, 37-38 (N.D. Tex. 1994), criticized the Ninth Circuit's position. *Id.* (giving the heightened pleading standard "its broadest application consistent with *Leatherman*," and concluding "that to abolish, or even limit as the Ninth Circuit has, the heightened pleading requirement is to improperly remove much of the protection from suit qualified immunity is meant to provide").

The plaintiffs in *Mendocino Environmental Center* were advocates for an environmental organization, Earth First!, that opposed logging practices in Northern California.[153] In the winter of 1990, Earth First! embarked on a nonviolent political campaign, inviting participants from across the country to join in " 'Redwood Summer,' " a major protest against logging practices alleged to be harmful to the environment.[154] According to the plaintiffs, the activities of Earth First!, and especially its plans for Redwood Summer, were met with considerable opposition and animus from the logging and timber industry. The plaintiffs also alleged that local law enforcement officials and FBI agents who were allegedly involved in an investigation of Earth First! opposed Earth First! activities.[155]

On May 24, 1990, plaintiffs Bari and Cherney were seriously injured when a bomb exploded in Bari's car.[156] After an investigation of the incident, Oakland police and FBI agents arrested Bari and Cherney for transporting explosives.[157] During the course of the investigation, law enforcement officials informed the media that the bomb was positioned behind Bari's seat, the implication being that plaintiffs had knowledge that the bomb was in the car and that the members of Earth First! were terrorists.[158]

Plaintiffs sued local law enforcement officials and FBI agents, alleging violations of their First and Fourth Amendment rights.[159] The district court denied the FBI agents' motion to dismiss on qualified immunity grounds, and they appealed.[160] The Ninth Circuit considered each claim

153. *Mendocino Environmental Center*, 14 F.3d at 459.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 459-60.

159. *Id.* at 461.

160. *Id.* at 460. While the Ninth Circuit recognized the right of defendant officials to appeal the denial of qualified immunity based on the pleadings, the court also reminded the parties of the Ninth Circuit rule that " '*[o]ne* such interlocutory appeal is all that a government official is entitled to and all that we will entertain.' " *Id.* (quoting Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 871 (9th Cir. 1992)); *see also* Abel v. Miller, 904 F.2d 394, 397 (7th Cir. 1990) (holding sequential appeals of pretrial orders denying qualified immunity are not authorized under Mitchell v. Forsyth, 472 U.S. 511 (1985)). *But see* English v. Dyke, 23 F.3d 1086, 1089 (6th Cir. 1994) (noting that "[a] denial of the [qualified immunity] defense at any stage entitles a defendant to an immediate appeal" regardless of whether the defendant has already appealed a denial at an earlier stage of litigation).

Because the plaintiff's burden is minimal at the pleadings stage, as compared to the summary judgment stage, the Ninth Circuit in *Mendocino Environmental Center* implied that officials might be better off waiting until after an adverse summary judgment ruling to take the interlocutory appeal. *Mendocino Environmental Center*, 14 F.3d at 461.

asserted by the plaintiffs, first determining whether the claim was subject to a heightened pleading standard, and, second, if so, determining whether the claim satisfied the standard.[161]

Plaintiffs alleged that law enforcement officials violated their Fourth Amendment rights by an arrest without probable cause and by an unlawful search authorized by a warrant based on knowingly-false statements.[162] The Ninth Circuit noted that the purpose of the heightened pleading standard is to address the tension existing between the objective reasonableness test of qualified immunity and claims in which subjective intent is a necessary element of the constitutional tort.[163] The Ninth Circuit held that the heightened pleading standard is inapplicable in cases in which subjective intent is irrelevant in establishing the constitutional wrong.[164]

A claim of unlawful arrest is dependant upon the objective reasonableness of the officer's decision to arrest, that is, whether a reasonable law enforcement officer, given the same facts and circumstances confronting the defendant, would have believed there was probable cause to make an arrest.[165] Because the state of mind of the officer is irrelevant to determine whether there was in fact probable cause, as well as to the qualified immunity inquiry of whether a reasonable officer would have believed there was probable cause, the Ninth Circuit did not require plaintiffs to satisfy the heightened pleading standard for the unlawful arrest claim.[166] Thus, the district court properly denied defendants' motion to dismiss that claim.[167]

Plaintiffs based their Fourth Amendment unlawful search claims, however, on allegations that the defendants knowingly made false statements to local law enforcement officials, which were relied upon to procure search warrants.[168] Plaintiffs listed specific portions of the affidavits they claimed were false,[169] provided limited facts from which it could be inferred that defendants knew of the falsity of the information they pro-

161. *Mendocino Environmental Center*, 14 F.3d at 461-65.

162. *Id.* at 461.

163. *Id.*

164. *Id.* at 461-62.

165. *Id.* at 462.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* Specifically, plaintiffs claimed that the portions of the affidavits stating that the bomb was located behind the driver's seat and that there was evidence of the bomb having been made in plaintiff Bari's home were false. *Id.*

vided to local officials,[170] and alleged that the false statements were a necessary prerequisite for the magistrate to find probable cause.[171] Because claims of judicial deception implicate the defendants' subjective state of mind, the Ninth Circuit measured the sufficiency of these claims under the pleading standard announced in *Branch I*.[172] Accordingly, the court agreed with the district court that plaintiffs' allegations satisfied the heightened pleading standard.[173]

Like their Fourth Amendment claims based on the deception of the magistrate, plaintiffs' First Amendment claims asserting that defendants intended to intimidate plaintiffs and chill their legitimate political expression turned on the state of mind of the defendants. Thus, these claims also were subject to *Branch I*'s heightened pleading standard.[174] The Ninth Circuit found that the complaint contained sufficiently specific factual allegations of impermissible motive by the FBI agents to withstand the heightened standard.[175]

Finally, the Ninth Circuit found that the conspiracy claim asserted by the plaintiffs was pleaded satisfactorily.[176] Plaintiffs alleged a meeting of the minds among all the defendants, state and federal, for the purpose of chilling plaintiffs' constitutionally protected political activity and noted overt acts taken in furtherance of the conspiracy.[177]

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170. *Id.* Plaintiffs alleged that the FBI agents knew that the bomb was located *under*, not *behind*, the front seat. *Id.* The complaint also made reference to the local officer's affidavit representing that his information about the bomb came from the FBI agents. *Id.* at 463. The Ninth Circuit deemed these allegations, although based on affidavits not identifying by name the particular FBI agent or agents who conveyed the false information, sufficient to satisfy *Branch I*'s heightened pleading standard. *Id.* Knowledge as to which agent or agents actually communicated the false information would be primarily within the control of the defendants, and plaintiffs would not be required to provide such evidence prior to discovery. *Id.* at 463-64.

171. *Id.* at 463.

172. *Id.*

173. *Id.*

174. *Id.* at 464.

175. *Id.* The complaint alleged that prior to Redwood Summer, the FBI had engaged in baseless investigations of other members of Earth First!, that agents provided false information with respect to plaintiffs' arrest to disrupt their political activities, and that defendants harbored a "constitutionally impermissible, politically-based animus" against plaintiffs. *Id.*

176. *Id.* at 465.

177. *Id.* Generally, plaintiffs have been required to plead conspiracies to violate constitutional rights with more specificity than mandated by mere notice pleading. *See, e.g.*, Crabtree v. Muchmore, 904 F.2d 1475, 1481 (10th Cir. 1990).

In Loftus v. Southeastern Pa. Transp. Auth., 843 F. Supp. 981 (E.D. Pa. 1994), plaintiff alleged that his employer and his union conspired to deprive him of his employment without due process of law. *Id.* at 981-82. The district court noted that "[t]hough *Leatherman* dealt specifically with a § 1983 claim against a municipality, the *ratio decidendi* of the case reaches beyond claims against municipalities." *Id.* at 984. In applying the rule established

IV. *HARLOW* AND HEIGHTENED PLEADING

Use of the heightened pleading standard in individual capacity suits when subjective intent is an element of the underlying constitutional claim is most often justified by the Supreme Court's decision in *Harlow v. Fitzgerald*.[178] In *Harlow*, the Supreme Court abandoned the subjective prong of the qualified immunity defense applied in *Wood v. Strickland*.[179] *Wood* held that an official had no qualified immunity in a section 1983 suit "if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [plaintiff], *or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]*."[180] The relevance of the defendant official's state of mind to the immunity analysis made it unlikely that the immunity defense would result in the dismissal of the litigation at the summary judgment stage.[181]

Under *Harlow*, the inquiry became an objective one: whether the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[182] In rejecting the subjective component of the qualified immunity test, the Court warned that mere allegations of malice are insufficient to hold a government official's feet to the fiery costs of trial or burdensome discovery.[183]

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by *Leatherman*, the district court concluded "that a § 1983 claim, with the possible exception of actions brought against individual government officials . . . must meet only the pleading requirements of Rule 8(a)(2) and is no longer subject to prior circuit law requiring the claim to be tested against a 'heightened pleading standard.' " *Id.* at 985 (citation omitted); *see also* Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1448-49 (9th Cir. 1994) (holding the Supreme Court has recently rejected heightened pleading requirements in almost all cases except fraud and mistake, and any imposition of such heightened standard would require an amendment of Rules 8 and 9); Boyer v. Pottstown Borough, CIV.A.94-1716, 1994 WL 385009, at *3 (E.D. Pa. July 19, 1994) (finding plaintiff's allegations in her complaint conclusory, but nonetheless holding them sufficient to provide defendants an opportunity to answer based on the Supreme Court's decision in *Leatherman*). *But see* Biase v. Kaplan, 852 F. Supp. 268, 287 (D.N.J. 1994) (explaining that "[a] complaint cannot survive a motion to dismiss if it contains only conclusory allegations of conspiracy, but does not support those allegations with averments of the underlying material facts' " (quoting Flanagan v. Shively, 783 F. Supp. 922, 928-29 (M.D. Pa.), *aff'd*, 980 F.2d 722 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993))); Orange v. County of Suffolk, 830 F. Supp. 701, 707 (E.D.N.Y. 1993) (holding *Leatherman* did not change the requirement of heightened pleading in cases alleging a conspiracy).

178. 457 U.S. 800 (1982).

179. *Id.* at 818-19; *see* Wood v. Strickland, 420 U.S. 308 (1975).

180. *Wood*, 420 U.S. at 322 (emphasis added).

181. The Supreme Court noted the difficulty of summary judgment based upon factual disputes as to the official's subjective good faith. *Harlow*, 457 U.S. at 818.

182. *Id.*

183. *Id.* at 817-18.

Since *Harlow*, courts have perceived a "tension" between the objective focus of the qualified immunity analysis and the need for plaintiffs to make reference to intent when state of mind is a necessary component of the underlying constitutional claim.[184] To begin to sort out the confusion[185] in this area, Judge Edwards' observation in *Kimberlin* correctly explains that "[a]lthough the Court purported to eliminate inquiry into the subjective intent of Government officials, *Harlow* did not discuss cases in which unconstitutional motive is an essential element of the claim."[186]

The qualified immunity analysis involves three separate inquiries: (1) Does the plaintiff assert the violation of a federal constitutional or statutory right under existing law? (2) Was the right clearly established at the time of the challenged conduct? and, (3) Would a reasonable official, given the facts and circumstances confronting the defendant, have understood that her conduct violated plaintiff's clearly established right?[187]

A number of courts have recognized that *Harlow* certainly does not preclude the plaintiff from asserting, nor the court from considering, allegations relating to defendant's state of mind when subjective intent is a necessary element of the constitutional claim.[188] Indeed, allegations of

184. *See, e.g.*, Branch v. Tunnell, 937 F.2d 1382, 1385 (9th Cir. 1991); *see also* Gainor v. Rogers, 973 F.2d 1379, 1390 (8th Cir. 1992) (Loken, J., dissenting) (indicating the Supreme Court failed to address the situation when the defendant's motives are at issue and the undisputed facts indicate the defendant had an objectively reasonable basis for his actions and questioning whether a mere allegation of "bad motive [can] defeat summary judgement on qualified immunity grounds").

185. *See* Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 137 (1985) (explaining that "[t]he *Harlow* standard of qualified immunity has generated much confusion in the lower federal courts with respect to how an objective standard should operate in cases in which the substantive law controlling the plaintiff's claim makes state of mind an essential element of the constitutional violation").

186. Kimberlin v. Quinlan, 6 F.3d 789, 804 (D.C. Cir. 1993) (Edwards, J., dissenting), *cert. granted*, 115 S. Ct. 929 (1995).

187. *See, e.g.*, Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993) (holding that to determine whether a defendant official is entitled to qualified immunity a court must make the three separate inquiries), *cert. denied*, 114 S. Ct. 1081 (1994); Gordon v. Kidd, 971 F.2d 1087, 1093 (4th Cir. 1992) (same); Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991) (same).

188. *See, e.g.*, Broderick v. Roache, 996 F.2d 1294, 1297-98 (1st Cir. 1993) (holding that the district court did not err in taking into consideration defendant's intent in the course of its qualified immunity analysis in cases in which state of mind is an essential component of plaintiff's underlying constitutional claim); Hannula v. City of Lakewood, 907 F.2d 129, 132 n.4 (10th Cir. 1990) (noting that "[a]lthough qualified immunity normally involves only objective standards, inquiry into subjective standards is not precluded when they are essential elements in a plaintiff's claim"); *see also* Balcerzak, *supra* note 185, at 127 (commenting that "[i]t is unlikely that the Court meant for *Harlow* to prevent a plaintiff from inquiring into the reasons behind an official's conduct when the substantive law controlling

defendant's subjective intent must be included by the plaintiff and must be considered by the court in addressing the first question of the qualified immunity analysis: whether plaintiff has stated a constitutional claim upon which relief can be granted.[189]

State of mind plays no part in steps two and three of the qualified immunity analysis. Whether a particular right was established at the time of the challenged conduct is a question of law that has nothing to do with defendant's state of mind in a given case.[190] The final step in the analysis hinges on the objective reasonableness of the officer's conduct, not his subjective intent.[191] Thus, intent is relevant to the availability of qualified immunity only as it relates to plaintiff's statement of a valid claim for relief. If the constitutional violation asserted does not embody an intent requirement, then state of mind is irrelevant to the qualified immunity analysis[192] and "bare allegations of malice" should not defeat an immu-

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the plaintiff's claim makes the official's state of mind a necessary component of the constitutional violation").

189. *See, e.g.*, Tompkins v. Vickers, 26 F.3d 603, 607 (5th Cir. 1994) (explaining that "[e]very Circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation"); Wright v. Jefferson County Police Dep't, No. 92-6203, 1993 WL 503748, at *3 (6th Cir. Dec. 8, 1993) (explaining that "when intent is an element of the substantive claim, the court must examine the officer's intent under a qualified immunity analysis to determine if he has violated 'clearly established' law"); Fiorenzo v. Nolan, 965 F.2d 348, 351-52 (7th Cir. 1992) (holding when state of mind is at issue the court must determine (1) whether the alleged actions violate a constitutional right and (2) whether the constitutional right was clearly established at the time in question and noting that intent was relevant to the first inquiry); *In re* Chicago Police Officer Promotions, Nos. 91 C 668, 90 C 1923, 90 C 950, 90 C 5456, 1994 WL 424146, at *13 (N.D. Ill. Aug. 11, 1994) (noting that when "intent is an element of a constitutional claim, . . . some kernel of proof of that element is necessary to defeat a motion for summary judgment based upon qualified immunity").

190. *See, e.g.*, Auriemma v. Rice, 910 F.2d 1449, 1453 (7th Cir. 1990) (en banc) (concluding that "when intent is crucial to a party's claim . . . the court's consideration of intent is relevant to the determination of whether a constitutional violation exists but not in deciding if the constitutional standard was clearly established"), *cert. denied*, 501 U.S. 1204 (1991).

191. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (discussing the objective reasonableness test in a qualified immunity analysis).

192. *See, e.g.*, Wright v. Jefferson County Police Dep't, No. 92-6203, 1993 WL 503748 at *3 (6th Cir. Dec. 8, 1993) (finding that "[t]he subjective views of the officers are irrelevant for purposes of determining qualified immunity to a section 1983 action based on an unreasonable search and seizure"); Pritchett v. Alford, 973 F.2d 307, 315 (4th Cir. 1992) (concluding that an "[i]llegal motive on the officer's part need not also be shown in order to defeat a qualified immunity defense to a Fourth Amendment claim which itself has no motive element"); White v. City of Taylor, 849 F. Supp. 1186, 1190 (E.D. Mich. 1994) (holding that improper intent on the part of police officers need not be shown; instead the officers behavior is measured by whether it was objectively reasonable).

nity defense that would otherwise prevail at the discovery stage.[193] This is the message of *Harlow*. While holding that plaintiffs may not skirt the qualified immunity defense simply by alleging malicious intent, the *Harlow* Court did not intend to insulate officials from liability whenever state of mind is essential to the underlying constitutional claim.[194]

The tension created in cases involving subjective intent occurs at the initial step of the qualified immunity analysis, when the issue is whether the plaintiff has sufficiently pleaded a constitutional claim. If the plaintiff has indeed satisfactorily pleaded a claim that requires a constitutionally impermissible state of mind, there are few cases in which the court could conclude that the law was not clearly established or that a reasonable officer could have believed such conduct to be constitutional.[195] Thus, the first step of the qualified immunity analysis will generally be dispositive of the immunity issue at the pleadings stage when subjective intent is an element of the underlying claim.

This problem is well illustrated in *Lindsey v. Shalmy*.[196] In *Lindsey*, plaintiff complained that her supervisor, Chief of Enforcement in the Clark County Department of Business License, discriminated against her on the basis of gender.[197] Thus, the subjective intent of the defendant was relevant to the constitutional claim asserted. The district court denied defendant's motion for summary judgment and defendant appealed.[198] Although *Lindsey* involved a motion for summary judgment, as opposed to a motion to dismiss, the court's analysis highlights the problem, or tension, that most courts confront at the motion to dismiss stage.[199] The court determined some element of subjective intent must be taken into account when determining if a government official is entitled to immunity.[200] Yet, assuming the existence of the disputed motiva-

193. *Harlow*, 457 U.S. at 817-18.

194. Balcerzak, *supra* note 185 at 134-35.

195. *Cf.* Beard v. City of Northglenn, 24 F.3d 110, 114-15 (10th Cir. 1994) (explaining that no reasonable police officer can believe an arrest legal when the officer's deliberate deception led to the issuing of the arrest warrant); Horney v. Walla Walla County, CS-93-055-JBH, 1993 WL 350191, *11 (E.D. Wash. Aug. 31, 1993) (noting that "[i]f defendant's conduct is arbitrary and capricious, it cannot be objectively reasonable"). *But see* Auriemma v. Rice, 910 F.2d 1449, 1458-59 (7th Cir. 1990) (en banc) (holding that the defendant was entitled to qualified immunity on a section 1985(3) conspiracy claim because the law was not clearly established at the time that whites, as well as blacks, were protected by the statute), *cert. denied*, 501 U.S. 1204 (1991).

196. 29 F.3d 1382 (9th Cir. 1994).

197. *Id.* at 1383-84.

198. *Id.* at 1383.

199. *Id.* at 1384-85.

200. *Id.* at 1384.

tion "would send virtually every claim of unlawful discrimination to trial."[201]

The question becomes whether a heightened pleading standard is needed to protect officials from undue harassment, interference with job performance, and the burdens of discovery prior to the summary judgment stage. When should the presence of an element of intent be allowed to defeat a motion to dismiss? The answer proposed by most courts prior to, and some courts even in the wake of *Leatherman*, is only when the complaint contains "nonconclusory allegations of subjective motivation, supported either by direct *or* circumstantial evidence."[202] Placing a heightened burden on plaintiffs at the pleading stage, however, is contrary to the language of the Federal Rules, inconsistent with the rationale of *Leatherman*, and unnecessary to accommodate the concerns of *Harlow*.

V. CONCLUSION

No special pleading burden should be placed on plaintiffs in section 1983 individual capacity suits, even when plaintiffs are asserting claims that require subjective intent as an essential element. Under ordinary notice pleading requirements, a plaintiff is obligated to provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[203] While factual detail is not necessary, there should be some factual allegations supporting each material element of the claim.[204] On a motion to dismiss based on qualified immunity, a court should examine the complaint to determine if plaintiff has satisfied the minimal requirements of Rule 8(a)(2), nothing more.[205] Has the plaintiff alleged the essential elements of a claim for relief and stated the grounds upon which that claim rests?

Prior to discovery, a court should address and resolve the first two issues in the qualified immunity analysis. If the plaintiff has failed to al-

201. *Id.*

202. Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991); *see* Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring); Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457, 461 (9th Cir. 1994); Branch v. Tunnell, 14 F.3d 449, 456 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994); *see also* Balcerzak, *supra* note 185, at 146 (stating in civil rights complaints the plaintiff should be required to "support his allegations of unconstitutional purpose or intent . . . by specifying the factual predicate underlying the constitutional deprivation in sufficient detail to establish a prima facie case entitling him to relief").

203. Conley v. Gibson, 355 U.S. 41, 47 (1957).

204. *See, e.g.*, Gallardo v. Board of County Comm'rs, 857 F. Supp. 783, 787 (D. Kan. 1994) (discussing ordinary pleading requirements of Rule 8(a)).

205. *See* Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 497 (7th Cir. 1993).

lege, under the minimal standards of notice pleading, the material elements of a federal constitutional or statutory claim, then the complaint should be dismissed on the merits for failure to state a claim upon which relief can be granted. Even if the complaint states a claim under current law, the court may still grant the motion to dismiss on qualified immunity grounds if the right plaintiff asserts was not clearly established when the challenged conduct occurred. This issue is purely legal and can be resolved by the court during the earliest stages of the litigation. The third step of the immunity analysis determines the objective reasonableness of the defendant's conduct and takes into consideration the facts and circumstances known to the defendant at the time. This generally requires more information than the plaintiff need allege in the complaint under notice pleading and is better addressed by summary judgment procedures.

Unless a defendant is satisfied that plaintiff states no claim upon which relief can be granted under the generous standards of notice pleading or that the right plaintiff asserts was not clearly established, defendant should raise the qualified immunity defense by way of a motion for summary judgment under Rule 56[206] rather than by way of a motion to dismiss under Rule 12(b)(6).[207] Once a defendant moves for summary judgment, the plaintiff cannot merely rely on the minimal allegations in the complaint, but must submit "specific, nonconclusory factual allegations" to support the claim.[208] If the motion is made prior to discovery[209]

206. FED. R. CIV. P. 56; *see* Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 578 (1986). For a discussion addressing the history, development, and application of summary judgment principles, see generally William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1992).

207. *See, e.g.*, Tuite v. Henry, No. 93 C 3248, 1994 WL 55711, at *4 (N.D. Ill. Feb. 22, 1994) (explaining that "*Triad* . . . seems to indicate strongly that if the defendants wish to raise qualified immunity as a defense, they should do so in a summary judgment motion rather than in a motion to dismiss").

208. Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring); *see also* Tompkins v. Vickers, 26 F.3d 603, 608 (5th Cir. 1994) (noting that "[a]t the summary judgment stage, [plaintiff] cannot rely on allegations; he must produce specific support for his claim of unconstitutional motive"); Howard v. Suskie, 26 F.3d 84, 87 (8th Cir. 1994) (finding that plaintiff bears the burden of moving beyond mere allegations in his pleadings to "establishing a genuine dispute regarding [defendant's] motivation in imposing the . . . sanction"); Hill v. Shelander, 992 F.2d 714, 717 (7th Cir. 1993) (finding that "[b]ecause [plaintiff] has thus asserted a constitutional claim requiring proof of intent, he must adduce specific factual support for his allegation of bad intent to survive a motion for summary judgment").

209. It should be noted that Rule 56(b) allows a defending party to move "at any time" for summary judgment. FED. R. CIV. P. 56(b). As Judge Easterbrook noted in *Thomas*, this provision authorizes motions prior to any discovery. Elliott v. Thomas, 937 F.2d 338,

and a plaintiff lacks the specific factual information to support the material elements of the claim, the plaintiff could move for discovery under Rule 56(f)[210] and the court could limit such discovery to matters related to the qualified immunity issue.[211] In cases in which a defendant's state of mind is crucial to the underlying substantive claim and in which facts pertaining to that issue are "peculiarly within the control of the defendant,"[212] plaintiffs should be allowed discovery " 'tailored specifically to the question of . . . qualified immunity.' "[213]

In summary, notice pleading requirements serve to weed out truly frivolous claims from the judicial system. Even claims that state a claim upon which relief may be granted under applicable law will fail at the pleading stage unless the plaintiff can demonstrate that the law was

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345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992); *see also* Thrower v. Barney, 849 F. Supp. 1445, 1446 (N.D. Ala. 1994) (explaining that "[t]he amended rules [particularly Rule 26(f)] contemplate that no discovery shall be undertaken until after the parties meet and confer" but that "the rules do not stand in the way of the filing of a motion to dismiss or of a motion for summary judgment before discovery").

210. *See* FED. R. CIV. P. 56(f).

211. As one commentator has observed:

> Because a defendant may make a motion for summary judgment at the commencement of a suit, a plaintiff could be placed in the same situation presented by the heightened standard—i.e., compelled to allege facts that are as yet unknown. Rule 56(f), however, gives a court the means to allow the plaintiff to discover the existence of any necessary elements of the claim. After postponing a summary judgment decision under 56(f), a court could allow sufficient discovery to determine the merits of the claim. The discovery granted need not have the same debilitating effects that summary judgment seeks to avoid. First, a plaintiff is not automatically entitled to a Rule 56(f) motion. The plaintiff must convince the court that the information sought could not have been obtained earlier and that the requested discovery is likely to unearth sufficient facts to defeat the summary judgment motion. A defendant could then serve depositions on the plaintiff to discover any deficiencies of the plaintiff's allegations on the immunity question, and successfully move for summary judgment if the allegations are insufficient. In this way, Rule 56(f) would allow courts to tailor discovery to the minimum amount necessary to determine the merits of a claim.

Cottrell, *supra* note 4, at 1110-11 (footnotes omitted); *see also* Castro v. United States, 34 F.3d 106, 111 (2d Cir. 1994) (finding that when defendants' conduct appears unreasonable and certain facts are solely within defendants' knowledge, summary judgement will rarely be granted without permitting the plaintiff discovery concerning items bearing on defendants' claims of immunity); Lion Boulos v. Wilson, 834 F.2d 504, 507-08 (5th Cir. 1987) (allowing discovery "narrowly tailored to uncover only those facts needed to rule on the immunity claim"); Williams v. County of Sullivan, 157 F.R.D. 6, 9 (S.D.N.Y. 1994) (same).

212. *Siegert*, 500 U.S. at 246 (Marshall, J., joined by Blackmun, J., and Stevens, J., dissenting).

213. *Id.* (alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635, 647 n.6 (1987)); *see also* Hill v. Shelander, 992 F.2d 714, 717 (7th Cir. 1993) (noting that "despite *Harlow's* focus on a purely objective inquiry, the plaintiff must be afforded an adequate opportunity to establish intent when it is an element of the alleged constitutional violation").

clearly established when the defendant's conduct occurred. Summary judgment demands require the plaintiff's claim to meet a more rigorous standard and are sufficient to prevent non-meritorious claims from reaching the trial stage.[214]

214. *See* Tompkins v. Vickers, 26 F.3d 603, 608 (5th Cir. 1994) (stating that the court is "convinced that the requirements of Rule 56 accommodate the interests of public officials seeking protection from groundless claims as well as the interests of plaintiffs seeking vindication of constitutional rights").